United States Bankruptcy Court
Eastern District of Michigan
Southern Division – Flint

In re:
Robert K. McGaffigan a/k/a/ Complete Cabinets,
Debtor
_____/

Case No. 02-32159
Chapter 7

Lafata Enterprises, Inc. d/b/a Lafata Cabinets,
Plaintiff

v.

Adv. No. 02-3115

Robert K. McGaffigan a/k/a Complete Cabinets,
Defendant
_____/

Opinion Finding Debt Nondischargeable pursuant to Section 523(a)(4)

On July 17, 2002, Plaintiff Lafata Enterprises, Inc. ("Lafata") filed this adversary against Debtor Robert McGaffigan ("McGaffigan") seeking nondischargeability of $43,769.50 owed it by McGaffigan, pursuant to 11 U.S.C. § 523(a)(4). The trial was held on November 15, 2005. The sole issue is whether McGaffigan is a "subcontractor" within the scope of the Michigan Builder's Trust Fund Act, M.C.L. § 570.151. The Court finds that the Lafata has failed to meet it's burden of proof on this issue.

I. Facts

Meyers Building Construction Company ("Meyers") contracted with various home owners to construct their residences, in the course of which it would subcontract or arrange for completion or installation of various components of the project.

McGaffigan, as the sole proprietor of "Complete Cabinets," was in the business of designing

the layout of kitchen cabinetry and providing cabinets (manufactured by Lafata in this instance) for these kitchens.

McGaffigan generally would generate business by dropping by residential construction sites and then seeking out and giving bids to the general contractor, such as Meyers in this case, for the cabinetry. Meyers gave him a blueprint with the kitchen layout and dimensions, and they would negotiate an agreed upon cost or budget, resulting in effect in the hiring or retention of McGaffigan for that aspect of the project. Once the budget was established, Meyers would give McGaffigan the homeowner's phone number for him to contact directly. McGaffigan would go to home sites and take exact measurements of the areas in which cabinets would be installed, then meet with the home buyers with samples and catalogues, etc., so that the homeowners could pick out their cabinetry. Although not specified by Meyers, McGaffigan usually used only Lafata cabinets.

The homeowners were given a number of choices as to style and configuration of the cabinets and any islands that were to be included; specifically the wood type and the finish, as well as some choice in the location of the cabinets in relation to the sinks, stoves, refrigerators and dishwashers. Within the parameters of what Lafata was capable of producing, McGaffigan would help the homeowners make these design and layout decisions, and, based on these decisions, would specify the proper cabinet colors, types, dimensions and layout to, and order them from, Lafata, and became liable to Lafata for payment. Lafata would build the cabinets to these specifications, and either deliver the completed cabinets directly to the building site, or have them delivered to McGaffigan, who would deliver them to the site. McGaffigan was only responsible for getting the cabinets timely to the building site. He was not responsible for their installation – something which Meyers arranged for.

Meyers paid McGaffigan for completed jobs, and McGaffigan was responsible for payments to Lafata. McGaffigan's profit or compensation was essentially the difference between the budget amount negotiated with Meyers and the cost to him of the Lafata cabinets.

Meyers has paid McGaffigan for thirteen different homes or jobs, for which McGaffigan did not pay Lafata. Those unpaid sums are reflected in the following Lafata invoices, dated from April 17, 2001 to November 28, 2001:

Invoice # 63555 . . . . . $7409.24

Invoice # 63557 . . . . . $784.49

Invoice # 64663 . . . . . $239.89

Invoice # 64664 . . . . . $954.38

Invoice # 64735 . . . . . $21.20

Invoice # 64767 . . . . . $354.63

Invoice # 65456 . . . . . $26.50

Invoice # 66763 . . . . . $2249.05

Invoice # 66764 . . . . . $15,482.55

Invoice # 66845 . . . . . $4034.01

Invoice # 67179 . . . . . $172.27

Invoice # 67492 . . . . . $6687.02

Invoice # 67699 . . . . . $5354.27

TOTAL $43,769.50

Lafata brings this adversary proceeding seeking a judgment of nondischargeability under

§ 523(a)(4) for that amount.

II. Analysis

The Michigan Builder's Trust Fund Act provides:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

M.C.L. § 570.151.

If McGaffigan is found to be a "subcontractor" under applicable provisions of the Michigan Builders Trust Fund Act, then he will be found to be a "fiduciary" under11 U.S.C. § 523(a)(4), and the indicated debt is thus nondischargeable. *See Cappella v. Little* (*In re Little*), 163 B.R. 497, fn.2 (Bankr. E.D. Mich. 1994)("A person who is a trustee under § 570.151 is a fiduciary for purposes of § 523(a)(4)"). Put somewhat differently, the issue here is whether or not, as to the funds paid by Meyers to McGaffigan with respect to the jobs in question, McGaffigan will be considered a "fiduciary." If he was a "subcontractor" to Meyers, he would be. If he was not a subcontractor, he is not a fiduciary.

Creditor Lafata bears the burden of proving by a preponderance of the evidence that the debt should be excepted from discharge under § 523(a)(4), and thus has the burden of proving McGaffigan was such a subcontractor. *See Grogan v. Garner*, 498 U.S. 279 (1991); *Meyers v. IRS* (*In re Meyers*), 196 F.3d 622 (6th Cir. 1999).

This Court previously denied Lafata's motion for summary judgment, and in doing so, it

specifically set out the case law governing the issue, making the parties aware of exactly what was required to show in order to prevail, as follows:

> Michigan courts have promulgated a test to determine whether a party is a "subcontractor," or merely a "materialman." *Avery v. Board of Supervisors of Ionia County*, 39 N.W. 742 (Mich. 1888); *see also People v. Valley Mantel & Tire Co.*, 166 N.W. 839 (Mich. 1918).[1] The test is whether a party has so agreed to work in accordance with the original contract between the general contractor and the homeowner.[2] *See Avery*, 39 N.W. 742; *Valley Mantel*, 166 N.W. 839. If the party has agreed, it is a subcontractor. The *Valley Mantel* court clarified the test with the following example:
>
> > 'Under this definition, and according to this test, a manufacturer who agrees to furnish the doors and sash for a building in accordance with the terms of the original contract is a subcontractor, while, if he merely agrees to furnish them in accordance with certain measurements, he is a materialman.
> >
> > [However;] if he furnished the materials in ignorance of the terms of the original contract, while in fact they conform to the terms of that contract and result in a fulfillment of the original contract, the person furnishing the material would still be a materialman, 'because he has not agreed that the original contract shall be the standard.'
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> *Valley Mantel*, 166 N.W. at 840 (citation omitted).[3]

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1. Much of the authority regarding whether or not a party is a subcontractor predates the enactment of the Michigan Builder's Trust Fund Act; however, these old cases continue to be relied upon in post-enactment cases as controlling on the issue. *See Hub Elec. Co. v. Aetna Cas. and Sur. Co.*, 400 F. Supp. 77 (E.D. Mich. 1975).

2. In this case, all of the parties who sought the services of and contracted with the general contractor were homeowners. The other party to a contract with a general contractor need not be a homeowner for the statute to apply.

3. The *Hub Electric* court pointed out that the converse of the *Avery* test can be used to show that a party is *not* a subcontractor. When discussing *People v. Campfield*, 114 N.W. 659 (Mich. 1908), it noted that the plaintiff was found not to be a subcontractor because it would have been possible for the plaintiff to have "complied with the contract which bound him to the subcontractor while at the same time providing material which did not conform to the contract between the principal contractor and the [purchaser]." *Hub*, 400 F. Supp. at 82.

> In this kind of situation what is most relevant and has to be thoroughly explored in the context of the entire situation, is the contractual and other relationships between the homeowner, the general contractor and McGaffigan, including drawings, specifications, etc., in order to determine whether the criteria set forth in that case law has been satisfied. The facts before the Court in connection with this motion for summary judgment do not permit that to be properly and fully accomplished, necessitating a denial of such motion.

Opinion Denying Plaintiff Lafata Enterprises' Motion for Summary Judgment, dated July 27, 2004, docket #26.

Throughout the trial, both parties focused on the "merely a materialman" language in *Avery*, as opposed to focusing on the contractual relationship between the general contractor and the Debtor. The bulk of the trial, and the evidence introduced therein, concentrated on attempting to show that the Debtor was more than a "mere[] materialman," instead of showing that he was a "subcontractor." Contrary to the ostensible beliefs of the parties, these are not the same thing.

In *Valley Mantle*, the court held that to be a subcontractor, one must specifically agree that the original contract will be the standard by which his performance will be judged. The record does not reveal whether Debtor saw the contract, or had knowledge of its contents, nor whether the Debtor agreed to be bound by the terms of the contract, even sight unseen.

As to any contract between Meyers and the Debtor, Debtor merely testified he was given a budget and a blueprint or drawing, which Debtor said he left on the job site when the cabinets were delivered (and did his best to replicate by way of a cursory hand-drawn exhibit in the case). Furthermore, even if any of the contracts had been introduced, and the drawings were a part thereof, such might not have been enough to establish that McGaffigan was a subcontractor.

> Nor does the fact that the plans and specifications were analyzed by itself indicate that one is a subcontractor unless it appears that there was present an agreement to perform

> in accordance with the terms of the original contract; that it would provide the standard by which one's performance would be judged.

Valley Mantle, 200 Mich 554, 166 N.W. 839 (1918).[4]

Finally, exceptions to discharge are to be narrowly construed. *See Grogan v. Garner*, 498 U.S. 279 (1991).

III. Conclusion

It is important to note that this case turns on the nature of the agreements between McGaffigan and Meyers and between Meyers and the homeowners of the residences into which the cabinets involved were installed. As to the former, all we know is that Meyers gave McGaffigan some sort of outline drawing of the kitchens and a budget figure. As to the latter, the record does not reflect any details; whatever the reasons, none of the agreements were entered as exhibits and there was no testimony as to the relevant material contents of those agreements, and in particular, there is nothing in the record with reference to the cabinetry or items to be supplied in connection therewith and/or what obligations, promises or warranties Meyers agreed to with the homeowners in connection therewith. Absent such it is difficult to see how the standards set forth in *Valley Mantle* can be met under this record, particularly when it is also clear that McGaffigan under this arrangement with Meyers was not required to install the cabinets.

Absent any credible evidence from which the provisions of the contract between Meyers and the homeowners can be properly inferred, or any evidence that McGaffigan ever knew about or

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4. Much of the relevant *Valley Mantle* language was quoted verbatim in *Hub Electric*, a case that Lafata directly cited to during the trial.

expressly agreed to be bound by that contract, one simply cannot conclude or infer from this record that McGaffigan did agree to be so bound. And, as noted in the cited cases, even if the cabinets did in fact conform to the provisions of the contract between Meyers and the homeowners, and resulted in its fulfillment, McGaffigan still would not be a subcontractor because on this record it cannot be concluded that he knew about or agreed to conform to its provisions. The line may be a fine one in any given case but it has been drawn by the cited Michigan court decisions and delineated in this Court's prior decision. In this Court's view, Lafata has therefore simply not borne its burden, and accordingly the Court must conclude that the $43,769.50 debt owed Lafata is dischargeable.

Entered: December 24, 2005

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge